**IN THE COURT OF APPEALS OF THE STATE OF IDAHO**

**Docket No. 34141**

| | | |
|---|---|---|
| **JAMES E. HEBERT,** | ) | **2009 Unpublished Opinion No. 416** |
| | ) | |
| **Petitioner-Appellant,** | ) | **Filed: April 8, 2009** |
| | ) | |
| **v.** | ) | **Stephen W. Kenyon, Clerk** |
| | ) | |
| **STATE OF IDAHO,** | ) | **THIS IS AN UNPUBLISHED** |
| | ) | **OPINION AND SHALL NOT** |
| **Respondent.** | ) | **BE CITED AS AUTHORITY** |
| | ) | |

Appeal from the District Court of the Second Judicial District, State of Idaho, Clearwater County. Hon. John H. Bradbury, District Judge.

Order denying application for post-conviction relief, affirmed.

James E. Hebert, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

---

PERRY, Judge

James E. Hebert appeals from the district court's order denying his application for post-conviction relief following an evidentiary hearing. For the reasons set forth below, we affirm.

**I.**

**FACTS AND PROCEDURE**

In late August and early October 2002, complaints were filed charging Hebert with lewd conduct with a minor and sexual battery of a minor for sexual acts he committed on his step-daughter, S.E. Hebert was assigned a public defender to represent him. In September 2002, trial was set for February 2003. In January 2003, Hebert signed a written waiver of his right to a speedy trial and a new trial date was set for May 2003. In late January, Hebert's public defender withdrew, and Hebert was assigned his second public defender. In March 2003, Hebert provided blood and DNA samples to determine if the victim's daughter was his. In early April 2003, Hebert's second public defender moved for, and the district court ordered, a psychological and a psychosexual evaluation to determine if Hebert was competent to aid in his own defense and to

aid the attorney in plea negotiations. The trial was again continued so that these evaluations could be conducted.

In early July 2003, the state moved for another continuance on the ground that it would take the state laboratory an additional four months to conduct the DNA testing regarding the paternity of the victim's child. In late July, Hebert's second public defender advised the district court that he was leaving the state. Hebert was briefly represented by his third public defender before his fourth public defender was assigned to represent him in early August. In mid-August, Hebert's fourth public defender--his trial attorney--moved for additional time to file motions and review files. The additional time was granted, a hearing on the motion in limine filed by Hebert was set for September, the parties stipulated that the DNA evidence established that Hebert was the father of the victim's child, and Hebert's jury trial was set for October 6, 2003.

On October 6, 2003, Hebert attempted to fire his trial attorney. The district court granted a one-day continuance so that Hebert and his trial attorney could further prepare Hebert's defense. Hebert's trial began October 7, 2003, and Hebert was found guilty of lewd conduct with a minor child under sixteen, I.C. § 18-1508, and sexual battery of a minor child sixteen or seventeen years of age, I.C. § 18-1508A. Hebert was sentenced to a unified term of forty years, with a minimum period of confinement of thirty years, for lewd conduct and a consecutive indeterminate term of ten years for sexual battery.

Hebert was assigned a public defender for his direct appeal. Hebert's appellate attorney appealed the denial of Hebert's motion in limine. This Court affirmed Hebert's judgments of conviction in an unpublished opinion. *State v. Hebert*, Docket Nos. 30324 and 30325 (Ct. App. Mar. 31, 2005).

Hebert filed an application for post-conviction relief. Hebert was assigned a post-conviction attorney and that attorney filed several motions. A three-day evidentiary hearing was conducted in January 2007 on Hebert's post-conviction allegations. The district court denied Hebert's post-conviction application, and he appeals.

## II.
## STANDARD OF REVIEW

In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990). When reviewing a decision denying post-conviction relief after an

evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

## III.
## ANALYSIS

Hebert asserts a variety of errors in his pro se appellate briefs, which total nearly ninety pages. Some of Hebert's arguments are misguided, like his reliance on provisions contained within the Uniform Commercial Code, his argument that the district court should have applied federal law, and his statement that the victim's "claim that she had been molested should have been cured" by their alleged subsequent marriage in Mexico. Some of Hebert's assignments of error lack argument or authority. *See Pizzuto v. State*, __ Idaho __, __, 202 P.3d 642, 647 (2008) (noting that assignments of error not supported by argument or authority in an opening brief will not be reviewed). Some of Hebert's assignments of error were not alleged in his original post-conviction application or in his amended post-conviction application or were not argued before the district court. *See Small v. State*, 132 Idaho 327, 332, 971 P.2d 1151, 1156 (Ct. App. 1998) (refusing to address post-conviction claims on appeal that were not presented first before the district court). Therefore, we will address only Hebert's assignments of error that are legitimate, supported by argument and authority, and properly preserved for appellate review.

### A. Jury Admonishment and District Court's Comment

Hebert argues that the district court violated his right to due process by entering the jury room to admonish the jury ex parte and by allegedly stating that Hebert would be found guilty and would be sentenced to life in prison. To support his claim regarding the ex parte admonishment Hebert cites to two recesses during his trial--one of fourteen minutes and one of thirteen minutes. Hebert asserts that the judge was talking to the jury for the entire twenty-seven minutes and that the "Judge has no more right in the jury room while they are deliberating than any other person."

After both recesses, the district court began by explaining that it had forgotten to admonish the jury not to discuss the case or form opinions until all the evidence was in. Hebert has provided no evidence that the district court did anything to the contrary. Instead of being in the jury room while the jury was deliberating, the district court was admonishing the jury not to deliberate until all of the evidence had been received. Furthermore, although Hebert argues strenuously about the twenty-seven minutes, there is no evidence that the district court actually spent the entire length of both recesses in with the jury.

With regard to this claim, the district court concluded:

> On two occasions I forgot to admonish the jury to not discuss the case among themselves and to keep an open mind. As soon as I realized the mistake, I went to the jury room and admonished them. No juror was called as a witness and there is no evidence that anything more than what the record reflects occurred. Given the strong case against Mr. Hebert, he had the most to gain from the jury keeping an open mind until he had a chance to put on his defense.

Hebert has not shown that his due process rights were violated by an ex parte admonishment to the jury.

Hebert also claims that the district court informed him at his arraignment that he would be found guilty and he would be sentenced to life in prison. Hebert has not supported this contention with a citation to the transcript. There is no evidence that the district court made this statement, and Hebert's trial attorney explained that what Hebert "may be referring to is at the arraignment [the district court] probably advised him of the maximum penalty." We conclude the district court correctly denied Hebert post-conviction relief on these issues.

**B. Prospective Juror's Comment**

Hebert asserts that a prospective juror, after being excused and on her way out of the courtroom, exclaimed "I know what he did to her." The comment does not appear in the transcripts from the jury selection. The district court found:

> The trial transcript does not reflect the remark. The electronic recording of the trial does not reflect the remark. Mr. Hebert asked for a copy of the electronic recording to see if it could be enhanced to discover if the remark was made. I gave him leave to have that done, but I refused to approve a $500 deposit to have it done in Colorado on the basis that if the jurors did not hear the remark, it does not matter if the remark was made. I find, based on the evidence at the hearing, that if the remark was made, it was not made within the hearing of the jurors who judged the case.

Hebert has provided no credible evidence that the comment was made, nor any evidence that it was heard by the jury. Consequently, Hebert is entitled to no relief on this claim.

**C. Ineffective Assistance of Counsel**

Hebert raises a variety of claims regarding ineffective assistance of both trial and appellate counsel. A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. This Court has long-adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

**1. Trial counsel**

Hebert alleges that he received ineffective assistance of trial counsel because his attorney failed to preserve his right to a speedy trial, failed to challenge his receipt of only seven peremptory challenges, failed to call witnesses, and generally failed to adequately prepare for trial.

**i. speedy trial**

Hebert argues that he received ineffective assistance of counsel because his trial attorney failed to protect his right to a speedy trial. Essentially, Hebert contends that, if his attorney would have filed a motion to dismiss based on a violation of Hebert's right to a speedy trial, his case would have been dismissed. In a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance. *Boman v. State*, 129 Idaho 520, 526, 927 P.2d 910, 916

(Ct. App. 1996). Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Id.*

A defendant in a criminal action is guaranteed the right to a speedy trial under the Sixth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, and under Article 1, Section 13 of the Idaho Constitution. *State v. Young*, 136 Idaho 113, 117, 29 P.3d 949, 953 (2001). Additionally, a defendant's right to a speedy trial has been codified and a criminal charge requires dismissal if a trial does not occur within six months from the date an information is filed with the court, absent a showing of good cause or delay attributable to the defendant. I.C. § 19-3501. This protection is designed to minimize the possibility of lengthy incarceration prior to trial; to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail; and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges. *United States v. Loud Hawk*, 474 U.S. 302, 311 (1986); *United States v. MacDonald*, 456 U.S. 1, 8 (1982); *State v. Davis*, 141 Idaho 828, 835-36, 118 P.3d 160, 167-68 (Ct. App. 2005).

To determine whether a defendant's constitutional right to a speedy trial was violated, under both the United States and Idaho Constitutions we employ the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). *See Young*, 136 Idaho at 117, 29 P.3d at 953. In *Barker*, the United States Supreme Court identified four factors that are weighed to determine whether there has been a constitutional violation. Those factors are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right to a speedy trial; and (4) the prejudice occasioned by the delay. *Barker*, 407 U.S. at 530.

With regard to Hebert's claim of ineffective assistance for failure to protect his speedy trial rights, the district court found:

> The Information charging Mr. Hebert with lewd conduct was filed on August 28, 2002[,] and the one charging him with sexual battery was filed on October 1, 2002. The trial was continued three months beyond the six month deadline to May 5, 2003. That was done with Mr. Hebert's informed consent.
>
> The May trial date was continued to August 11, 2003[,] on [Hebert's second attorney's] motion that Mr. Hebert be psychologically examined. [Hebert's second attorney] moved for the continuance because of his concern that Mr. Hebert was not able to assist him with his defense. [Hebert's second attorney] also sought a psycho-sexual examination to use for plea bargaining purposes with Mr. Hebert's consent. Mr. Hebert traveled from North Carolina to

> Idaho and submitted to the examinations without complaint about the trial delay necessary to facilitate the examinations.
>
> The last significant delay was occasioned by [Hebert's second attorney's] departure for Iowa, the appointment of [Hebert's trial attorney] as Mr. Hebert's new public defender and the inability of the state police laboratory to complete DNA tests in time for the trial as scheduled. Those events were beyond Mr. Hebert's control, [Hebert's trial attorney's] control and my control. The delay from August 11 to October 6 was as short as logistically possible, given a full trial calendar, the work load at the state police lab and the need for [Hebert's trial attorney] to familiarize himself with the case. During that period of time [Hebert's trial attorney] reviewed the file and applicable law and brought in limine motions that disclosed he had familiarized himself with the case and was acting on it. Again, Mr. Hebert did not complain about the delay.
>
> Mr. Hebert complains he was prejudiced by the last delay because it enabled the State to obtain DNA results that established he was the father of S.E.'s child. He forgets that he was adjudicated to be [the] father, that he wanted to visit her in January, that he had taken her away from S.E. against her will necessitating a protective order, and that he agreed to the DNA test because he wanted to know if [the victim's child] was his child. Additionally, S.E. herself credibly testified that Mr. Hebert was the father of her daughter.

Thereafter, the district court determined that the *Barker* factors demonstrated a permissible delay and that there was no constitutional violation of Hebert's right to a speedy trial.

Although the length of delay was slightly over twelve months on one case and slightly less than twelve months on the other, Hebert specifically waived his right to speedy trial for the first half of the delay. The other reasons for the delays include such things as a motion by Hebert's own attorney for a psychological evaluation to determine if Hebert was competent to aid in his own defense and time for state laboratory to analyze DNA. At Hebert's post-conviction hearing, Hebert testified that it was his mother's idea to get the evaluations done and that Hebert had agreed with the plan. Hebert's only assertion of his right to speedy trial was when he initially waived that right. Furthermore, Hebert requested a longer continuance on October 6, 2003--the day trial was scheduled to begin--rather than asserting his right. When asked at the post-conviction hearing whether his trial was delayed one day at Hebert's request, Hebert responded that he "wanted a total continuance." Finally, Hebert's brief does not argue that the delay in this case prejudiced him. As the district court determined: "If anyone had something to gain from the delay, it was [Hebert]. The evidence against him was overwhelming. Time was his only friend." We conclude that Hebert's trial attorneys were not ineffective because, if a motion to dismiss had been filed, it would have been denied.

**ii. peremptory challenges**

Hebert asserts that his trial attorney was ineffective because the attorney did not object to Hebert's receipt of only seven peremptory challenges and because the attorney did not peremptorily challenge the wife of a local police officer. One of the charges Hebert faced was for lewd conduct with a minor. Because lewd conduct is punishable by up to life in prison, Hebert and the state were entitled to ten peremptory challenges each plus one for the alternate juror. *See* I.C. § 19-2016; I.C.R. 24(c). However, at jury selection the district court, the prosecutor, and Hebert's attorney all proceeded under the mistaken belief that each side was entitled to only six peremptory challenges and one for the alternate juror for a total of seven.

With regard to the number of peremptory challenges and the wife of a local police officer serving on the jury, the district court found:

> [Hebert's trial attorney] testified he personally did not perempt [the wife of the officer] because he was concerned about who would replace her and that in any event he was not concerned about [the officer's wife] because she and her husband were having marital problems. He also stated the right to challenge a juror was Mr. Hebert's and that if he had wanted [the officer's wife] perempted, she would have been.
>
> There has been no showing [the officer's wife] was in fact prejudiced against Mr. Hebert because her husband was a police officer or for any other reason. She, as well as all the other prospective jurors, was questioned under oath about her biases. There is no factual basis to support the supposition she was less than honest. Mr. Hebert did not call her as a witness to evince any bias.
>
> Mr. Hebert knew [the juror's husband] was an Orofino policeman. He is not bashful about telling his lawyers what to do. He went in to the court room to confirm who members of the jury were. Mr. Hebert had the opportunity to challenge [the juror]. He could have done so. He did not. I conclude Mr. Hebert waived his right to challenge [the juror] by not exercising the ones he had. *State v. Lewis*, 126 Idaho 77, 80 [878 P.2d 776, 779 (1994).]
>
> Nor do I find [Hebert's trial attorney's] failure to object is ineffective assistance. The peremptory challenges that were allotted were not used. There is not any evidence the jury was biased.

Although it may have been ineffective assistance for Hebert's attorney to fail to realize that Hebert was entitled to eleven peremptory challenges, Hebert cannot demonstrate prejudice on this record. Hebert did not use all seven of the peremptory challenges that he was given. Therefore, he cannot show he was prejudiced by not receiving four more such challenges, which presumably would have also gone unused.

Furthermore, as the district court correctly notes, Hebert returned to the courtroom to personally view the jury before it was impaneled. He had an opportunity to remove the wife of the police officer at that time and declined to do so. Instead, Hebert personally approved the twelve jurors and the alternate. Additionally, with regard to both of these inquiries, Hebert has not demonstrated that anyone who remained on the panel was biased against him. *See State v. Ramos*, 119 Idaho 568, 570, 808 P.2d 1313, 1315 (1991) (holding that, if a defendant uses a peremptory challenge to exclude a juror that the court failed to exclude for cause, a new trial will only be granted if the defendant can demonstrate prejudice by showing that a remaining juror was biased against him). The district court correctly determined that Hebert's post-conviction application merited no relief on these issues.

**iii. Hebert's witnesses**

Hebert argues that he received ineffective assistance of counsel because he gave his trial attorney a list of witnesses and his attorney refused to call any of them at trial. Hebert did not produce any affidavits or testimony at his post-conviction hearing from the witnesses he claims his attorney was ineffective for failing to call. It is not enough to allege that a witness would have testified to certain events, or would have rebutted certain statements made at trial, without providing through affidavit, nonhearsay evidence of the substance of the witnesses' testimony. *Hall v. State*, 126 Idaho 449, 453, 884 P.2d 1165, 1169 (Ct. App. 1994).

At the evidentiary hearing, Hebert testified regarding several of his proposed witnesses. Hebert explained that his witnesses would have testified that the victim was promiscuous, that she was a bad influence on other children her age, that she smoked marijuana and shoplifted, and that the victim's mother--Hebert's ex-wife--was also promiscuous. Essentially, all of the proposed testimony Hebert wished to produce went to the alleged bad character of the victim and her mother. Hebert's trial attorney testified that Hebert's proposed witnesses' testimony was not relevant because it would not aid his defense, that most of the testimony was inadmissible, and that it was a tactical decision not to call Hebert's proposed witnesses. We conclude that Hebert's trial counsel was not ineffective for failing to call these witnesses.

**iv. trial preparation**

Hebert is generally unhappy with his trial attorney's performance. Hebert contends that, in addition to failing to call witnesses, his trial attorney was ineffective for failing to challenge certain evidence, produce certain evidence, and spend time with Hebert preparing for the case.

Specifically, Hebert asserts that "all some one [sic] would have to do is read the transcripts and see that I indeed was refused a fair and impartial trial due to the fact that I was given the most incompetent attorney that Idaho had to offer."

Determining whether an attorney's pretrial preparation falls below a level of reasonable performance constitutes a question of law, but is essentially premised upon the circumstances surrounding the attorney's investigation. *Gee v. State*, 117 Idaho 107, 110, 785 P.2d 671, 674 (Ct. App. 1990). To prevail on a claim that counsel's performance was deficient in failing to interview witnesses, a defendant must establish that the inadequacies complained of would have made a difference in the outcome. *Id.* at 111, 785 P.2d at 675. It is not sufficient merely to allege that counsel may have discovered a weakness in the state's case. *Id.* We will not second-guess trial counsel in the particularities of trial preparation. *Id.*

At Hebert's evidentiary hearing, there was extensive testimony from Hebert, his trial attorney, and an expert witness regarding Hebert's trial attorney's preparation. The district court concluded:

> Mr. Hebert chose to live in North Carolina during the pendency of the trial. During that time he had three different lawyers . . . .
>
> Mr. Hebert is an extremely difficult person to represent. He is impulsive and very aggressive. He often ignores counsel's advice to his detriment. He has difficulty dealing with reality and telling the truth. He has been dismissive, insulting, and belligerent to [his attorneys]. [Hebert's second attorney] was so concerned about Mr. Hebert's conduct he moved to have him psychologically tested to see if he was able to assist in his defense. . . .
>
> . . . The defenses available were few. As [Hebert's trial attorney] pointed out at the hearing, the DNA tests established Mr. Hebert was the father of the child born to S.E. The child's birth date established sexual relations by Mr. Hebert with S.E. when she was sixteen years of age. Mr. Hebert had also admitted his paternity and insisted on the right to visit the child when he was in Orofino during January of 2003.
>
> [Hebert's trial attorney] demonstrated a thorough knowledge of the case and the likely testimony against Mr. Hebert. Based on his review of the file, he brought the in limine motions he should have. He reviewed witness and jury lists with Mr. Hebert.
>
> Mr. Hebert contends [his trial attorney] never met with him after the Clarkston meeting. After that meeting, Mr. Hebert was arrested in Idaho and was confined in the Clearwater County jail. The jail log establishes that [Hebert's trial attorney] did meet with Mr. Hebert at the jail on the Friday before trial. On the first scheduled day of trial on Monday, the sixth of October, Mr. Hebert tried to fire [his trial attorney] because he had not spent the time with him that he thought

> he should have. The trial was delayed one day so Mr. Hebert and [his trial attorney] could further confer.
>
> [Hebert's trial attorney] properly declined to call the witnesses Mr. Hebert wanted to call because they had nothing to do with his guilt or innocence. Rather, they were an attempt to besmirch the reputations of S.E. and her mother, none of which was admissible.
>
> . . . .
>
> In sum, Mr. Hebert has suggested no plausible defenses that [his trial attorney] could have presented if he had spent more time with him.
>
> The facts demonstrate that [Hebert's trial attorney] presented the defenses that Mr. Hebert insisted on: the phony Mexican marriage, the alleged lesbian liaison between S.E. and her mother in McCall. They carried no persuasive weight or relevance. I find that [Hebert's trial attorney] did what he could with what he had to work with when he presented Mr. Hebert's defense.
>
> . . . .
>
> In this case [Hebert's trial attorney] was faced with tough choices. S.E. and her mother, Mr. Hebert's ex-wife, were very good witnesses. Their testimony was credible. They were presentable. The account they gave was compelling. Mr. Hebert's admission of paternity and the DNA test results were insurmountable. No amount of preparation could have changed that.
>
> . . . .
>
> I conclude Mr. Hebert has failed to rebut the presumption that [his trial attorney's] preparation for trial was reasonable and that even if it were deficient, there was not a reasonable probability that the outcome of the trial would have been different.

This Court has obliged Hebert's request and reviewed all of the transcripts and records from both his criminal case and post-conviction case. Hebert's trial attorney filed pretrial motions, conducted an engaging voir dire, allowed Hebert to approve the jury, made objections at trial, vigorously cross-examined witnesses, and essentially did the best he could with Hebert's case. "The constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better." *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992). Despite Hebert's vehement raving to the contrary, we agree with the district court's conclusion that Hebert's trial attorney's performance was not deficient and that Hebert has demonstrated no prejudice.

**2. Appellate counsel**

Hebert argues that he received ineffective assistance of appellate counsel because his attorney failed to appeal the denial of Hebert's right to a speedy trial, Hebert's receipt of only seven peremptory challenges, and the excessiveness of Hebert's sentences.

We have already determined that Hebert's trial attorneys would not have been successful in filing a motion to dismiss based on a speedy trial violation. Therefore, we conclude Hebert did not receive ineffective assistance of his appellate counsel based on his attorney's failure to appeal this issue. We have also determined that Hebert was not prejudiced by his trial attorney's failure to argue for the proper number of peremptory challenges. Therefore, we conclude that Hebert did not receive ineffective assistance of appellate counsel, nor was he prejudiced, by his appellate attorney's failure to appeal this issue. Finally, Hebert asserts that he was denied effective assistance of appellate counsel because his appellate attorney failed to challenge the excessiveness of his sentences. At Hebert's sentencing, Hebert told the district court: "You'll have to give me life. I won't settle for nothing less than life;" "I will never register as a sex offender, and the only other course of action is to give me life in prison;" and "Now if you are going to sentence me, then sentence me to life. Don't put me on parole, because I will not comply."

At Hebert's evidentiary hearing, his appellate attorney testified regarding the length of Hebert's sentences that "Hebert was adamant that I not raise that issue." With regard to this issue, the district court concluded:

> The account of Mr. Hebert's abuse was difficult to sit through. He played the [G]od card. His abuse of S.E. was directed by the angel Jericho. The abuse persisted continuously for years. S.E. had a child by him. He has never admitted his offenses. He shows no remorse. He blames everyone but himself for his plight. He challenged me to send him to prison for life because he would never register as a sex offender and would never comply with probation.
>
> There is no doubt that Mr. Hebert would continue to offend if he could. Rehabilitation and deterrence are not possible with someone who defies everyone. He is, in short, a person who will do what he wants if he can. Appellate counsel would have sacrificed credibility for the issue he did raise on appeal if he had challenged the length of the sentence. His assistance was effective.

The record supports the district court. Not only did Hebert argue for a life sentence, he told his appellate attorney not to appeal the length of the sentences he received. Hebert has not demonstrated that his appellate attorney performed deficiently, nor has Hebert demonstrated any prejudice.

## IV.

## CONCLUSION

The district court properly concluded that Hebert was not denied due process based on the court's ex parte admonishment to the jury and an alleged comment by the court. Hebert has not demonstrated that a prospective juror made a derogatory comment or that any actual juror heard the comment. Finally, Hebert has not demonstrated that he received ineffective assistance of either trial or appellate counsel. Therefore, the district court's order affirming the denial of Hebert's application for post-conviction relief is affirmed. Costs, but not attorney fees, are awarded to the state as the prevailing party.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**